

RESOLUTION NO. 75543

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AUTHORIZING THE CITY MANAGER TO NEGOTIATE AND EXECUTE AN ADDITIONAL FUNDING AGREEMENT FOR CONTRIBUTION BY THE SANTA CLARA COUNTY OPEN SPACE AUTHORITY TO THE CITY IN THE AMOUNT OF \$1,000,000 FOR ACQUISITION OF REAL PROPERTY FOR POSSIBLE FUTURE DEVELOPMENT OF THE THREE CREEKS TRAIL PROJECT

WHEREAS, in September 2000, the San José City Council ("Council") adopted the Greenprint, a strategic plan for parks, trails, community facilities and recreational programs; and

WHEREAS, on September 21, 2004, the Council authorized the City Manager to negotiate and execute a funding agreement with the Santa Clara County Open Space Authority ("OSA") for the acquisition of properties associated with the Three Creeks Trail Project; and

WHEREAS, the agreement expired on June 30, 2007 and was later extended to June 30, 2010; and

WHEREAS, on June 26, 2007, the Council authorized the City Manager to negotiate and execute an additional funding agreement with OSA for \$1,000,000 for the Three Creeks Trail Project; and

WHEREAS, on February 9, 2010, the Council authorized the City Manager to submit grant applications as part of State Proposition 84, including \$2,000,000 for expansion of

Bellevue Park, which, if funded, would acquire a railway parcel along the eastern alignment of the Three Creeks Trail for possible park and trail improvements; and

WHEREAS, on July 26, 2010, OSA's Acquisition Subcommittee recommended that the full OSA Board discuss the allocation of an additional \$1,000,000 for a total of \$3,000,000 to purchase lands along the western alignment of the Three Creeks Trail Project; and

WHEREAS, the \$1,000,000 agreement, if approved by the OSA Board on August 26, 2010 represents a new funding opportunity, sourced from the OSA, but from the OSA's 80% funds that are not allocated to a specific agency;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

The City Manager is hereby authorized to negotiate and execute an additional funding agreement for contribution by the Santa Clara County Open Space Authority to the City of San Jose in the amount of \$1,000,000 for acquisition of real property for possible future development of the Three Creeks Trail Project with the following commitment and assurances required by the City of San José:

1. City must operate and maintain the trail, once constructed that is acquired with OSA funding in perpetuity.

2. City must expend funding by an agreed deadline to be negotiated by the City Manager. If City does not expend the funds by the required deadline, City may need to refund the funds to OSA.
3. After the trail is developed, City must install a permanent sign recognizing OSA's contribution to the project.
4. City must record a Conservation Easement, in substantially the same form as attached in Exhibit A, against any real property acquired with OSA funding.

ADOPTED this 24th day of August, 2010, by the following vote:

AYES: CAMPOS, CHIRCO, CHU, CONSTANT, HERRERA,
KALRA, LICCARDO, NGUYEN, OLIVERIO, PYLE; REED.

NOES: NONE.

ABSENT: NONE.

DISQUALIFIED: NONE.

ATTEST:



LEE PRICE, MMC
City Clerk



CHUCK REED
Mayor

[Exhibit A is the Santa Clara County Open- Space Authority's (Authority) Model Conservation Easement for Deed Restrictions for the 20% Program Funds for use in participating jurisdictions' acquisition of open space. The deed conveying the real property to the locality must reference and incorporate Exhibit A (or equivalent name). Any variation from the Model Conservation Easement for Deed Restrictions should only be made with prior approval from Authority's general counsel. Exhibit A shall be attached to the deed when recorded.]

EXHIBIT A CONSERVATION EASEMENT

In reference to the property or properties conveyed by the Grant Deed between [property owner] ("Grantor"), and the [participating jurisdiction], its successors and assigns dated [INSERT]:

A. RECITALS

WHEREAS, the Santa Clara County Open-Space ("Authority") and the [Participating Jurisdiction] ("Grantee") entered into a Funding Agreement ("Agreement") dated [INSERT], to assist funding Grantee's acquisition of the real property, as described in the Grant Deed attached hereto and hereby incorporated by reference ("Property"); and

WHEREAS, the Authority has assisted with Grantee's acquisition of the Property for the purposes of preserving, protecting and managing, for the use and enjoyment of all people, a well-balanced system of urban and non-urban areas of outstanding scenic, recreational and agricultural importance;

WHEREAS, California Civil Code Section 815.1 defines "conservation easement" as any limitation in a deed, will or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition; *[Note here about recent activities – for instance some parcels will not be Ag.]*

WHEREAS, it is Grantee's intention that the limitations set forth below, shall run with the land and be binding on Grantee, its successors and assigns in perpetuity;

NOW, THEREFORE, the grant is made subject to the following limitations:

B. LIMITATIONS

1. Restrictions. Pursuant to Civil Code Section 815 et seq., Authority policy and the Agreement, the following restrictions shall apply in perpetuity to the Property described in the attached deed and acquired by Grantee:

a. *Permissible Uses.* The Property shall be used and maintained for open space and recreation, and be open to the public, in perpetuity.

b. *Structures.* No new structures or improvements shall be erected on the Property without written approval of the Authority, as provided through the General Manager, in which case the facility shall only be a public facility related to a designated open space or recreational use, or appurtenant thereto.

c. *Mitigation.* The Grantee shall not use or allow the use of any portion of the Property for mitigation without the written permission of the Authority's General Manager. Absent such permission, the Property shall not be available to count toward satisfying any open space or preserved land requirements as stipulated under applicable municipal land use laws, ordinances, or codes. Furthermore, Grantee may not transfer for use outside the Property (whether or not for compensation) any development rights allocated to the Property under applicable law. The terms of this restriction shall be perpetual and it shall be a covenant running with the land. In providing permission under this subsection, the General Manager may require that all funds generated in connection with any authorized or allowable mitigation on the real property shall be remitted promptly to the Authority until the Authority has been fully compensated for all of its past, present and future costs with respect to the Property, including, but not limited to, staff monitoring costs and acquisition costs at fair market value as of the time the mitigation is to begin.

d. *Mortgage only with approval.* The Property (including any portion of it or interest in it) may not be used as security for any debt without written approval of the Authority, through its General Manager.

e. *Transfer only with approval.* The Property (including any portion of it or interest in it) may not be transferred without written approval of the Authority, through its General Manager.

2. Covenants and Conditions. Pursuant to Civil Code Section 815 et seq., Authority policy and the Agreement, the following covenants and conditions shall apply in perpetuity to the Property described in the attached deed and acquired by Grantee:

a. *Run with the Land.* The restrictions, covenants and conditions set forth herein shall run with the land and bind the Property in perpetuity.

- b. *Binding on Successors.* The restrictions, covenants and conditions set forth herein shall, pursuant to its terms, inure to the benefit of the Authority, and bind the Property, Grantee and its successors and assigns.
- c. *Recordation.* This instrument shall forthwith be recorded in the Office of the Recorder of County of Santa Clara, California.
- d. *Access/Right to Inspect.* The Authority, its representatives and assigns shall have reasonable access to the Property to monitor compliance with the restrictions, covenants and conditions set forth herein.
- e. *Dissolution of Grantee.* If the existence of the Grantee ceases for any reason or if any of the restrictions, covenants or conditions stated herein are violated, all of the Grantee's rights, title and interest in the Property shall automatically vest in the Authority for the benefit of the Authority, or its successors, upon acceptance by the Authority.
- f. *Eminent Domain.* The Grantee shall promptly notice the Authority of any eminent domain proceeding affecting the Property, or any portion of it, and shall continuously provide the Authority with copies of all relevant documents. If the Grantee receives any compensation for the Property taking, whether by agreement, settlement or court order, then the Grantee shall promptly pay to the Authority a share of the proceeds proportionate to the Authority's contribution toward the purchase price of the Property.

C. ENFORCEMENT

- 1. General. The Authority shall have the right and power to enforce the restrictions, covenants and conditions set forth herein, by any proceedings at law or in equity, against the Grantee or any person or persons violating or attempting to violate any restriction, covenants and/or condition set forth herein; to restrain violations; to require specific performance and/or to recover damages.
- 2. Procedure. If the Authority determines that Grantee is in violation of the restrictions, covenants and conditions set forth herein or that a violation is threatened, the Authority shall give written notice to Grantee of such violation and demand corrective actions sufficient to cure the violation, and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the permitted uses of the restrictions, covenants and conditions set forth herein, to restore that portion of the Property so injured. If Grantee fails to cure the violation within thirty (30) days after receipt of notice thereof from the Authority, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing such violation within the thirty (30) day period, or fails to continue diligently to cure such violation until finally cured, the Authority

may bring an action at law or equity in a Court of competent jurisdiction to enforce the limitations, restrictions, covenants and conditions set forth herein, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction to recover any damages to which it may be entitled for violation of the restrictions, covenants and conditions set forth herein, or injury to any public interest protected by the restrictions, covenants and conditions set forth herein, and to require the restoration of the Property to the condition that existed prior to such injury.

3. Relief. Grantee agrees that the Authority's remedies at law for any violation of the restrictions, covenants and/or conditions set forth herein are inadequate, and that the Authority shall be entitled to the injunctive relief described in the immediately preceding paragraph 2, above, both prohibitive and mandatory, in addition to such other relief to which the Authority may be entitled, including specific performance of the restrictions, covenants and conditions set forth herein, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The Authority's remedies shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

4. Cost(s) of enforcement. Any costs incurred by the Authority in enforcing the restrictions, covenants and conditions set forth herein against Grantee, its successors and/or assigns including, without limitation, costs of suit and attorneys' fees, and any costs of restoration necessitated by Grantee's violation of the restrictions, covenants and conditions set forth herein shall be borne, joint and severally, by Grantee, its successors and/or assigns.

5. No Waiver. The failure by the Authority to enforce any restriction, covenant or condition herein contained shall in no event be deemed a waiver of the right to do so thereafter.

[GRANTEE]
a Municipal Corporation

[City Manager]

Date: _____

APPROVED AS TO FORM:

Deputy City Attorney